

MARCH 10, 1768.

A N S W E R S

F O R

DAVID SYME of *Cartmore*,



T O T H E

PETITION of *James Mudie of Easter Cocklaw*.

THE Lands of *Cocklaw*, in the Parish of *Beith*, in the North Part of *Fife*, were originally Church-lands, and belonged to the Abbey of *Dunfermline*, and there appears to have been Coal found and wrought in these Lands at a very early Period.

By a Charter, of this Date, recited in the Petition, it appears that *Robert*, then Commendator of *Dunfermline*, granted a Feu-
right of Three-eighth Parts of the foresaid Town and Lands of *Cocklaw*, in favours of *William Mackie*, in Liferent, and *John Mackie* his Son, and the Heirs of his Body in Fee; but, in this Charter, the Coal in these Lands, and the Power of working the Coal, is expressly reserved to the Commendator and his Successors.

August 10,
1566.

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In consequence of this Reservation, the said *Robert*, Commendator of *Dunfermline*, did, in 1573, grant a Charter of the Coal
in the foresaid Lands of *Cocklaw*, in favour of *William Douglas* of
Lockleven, upon which he was infeft; and, in this Investiture, the Coal is described in the following Manner: "Præfatam nostram
" carbonariam, lie Keltieheugh nuncupat. una cum solo ejusdem,
" cum tofta, crofta, et acra terræ eidem adjacen. jacen. infra
" bondas et limites oppidorum et terrarum de *Cocklaw* et *Lassodie*, in-
" fra dominium de *Dunfermline*, et vicecomitatum de *Fife*."

May 15,
1573.

It must be presumed, that, in virtue of this Right, the Coal in the Lands of *Cocklaw* was possessed by *Douglas* of *Lockleven*, and

A.

his

August 9,
1642.

his Successors, downwards to 1642, when it appears that *William Earl of Morton*, *Lochleven's* Successor, wadset the foresaid Coal for the Sum of 3750 Merks, to *William Mackie*, Portioner of *Cocklaw*, and *Margaret Beatson* his Spouse, who were infest upon the Contract of Wadset, 2d November said Year, and their Seafine duly recorded.

Soon after this, viz. in 1650, Lord *Burleigh* acquired Right, by Progress, from the Earl of *Morton*, to the Reversion of the foresaid Wadset; and, in the same Year, he acquired Right to One-half of the Wadset itself from *David Beatson* of *Carden*, to whom it had been conveyed by *William Mackie*, the original Wadsetter.—The other Half of the Wadset remained with *William Mackie*, and, upon his Death, was taken up by his Son *John Mackie*, as Heir to his Father, in virtue of a Precept of *clare constat* from Sir *William Bruce* of *Kinross*, the Superior; and the said *John Mackie* having conveyed his Half of the Wadset to his eldest Daughter in Life-rent, and her Son *John Stevenson* in Fee, it was conveyed by *Stevenson* to *Robert Lord Burleigh* in 1697.

It appears from this Progress, which is but briefly stated, as the Petitioner does not now dispute the Fact, that, in 1697, the then Lord *Burleigh*, came to have a compleat Right to the Coal, granted to *Douglas* of *Lochleven* by the Commendator of *Dunfermline*, in 1573; and as the intermediate Owners of that Right had wrought Coal through the whole Lands of *Cocklaw*, without Distinction, so it is admitted, that, from 1697 downwards, the Family of *Burleigh* possessed the Coal in the Lands of *Easter* and *Wester Cocklaw* indiscriminately, without Interruption; that the Coal was possessed, in the same Way, by Lessees under Mrs. *Margaret Balfour*, who purchased the Estate of *Burleigh* from the Barons of Exchequer, after the Rebellion 1715; and, in the same Manner also, during the Sequestration, that took place, when an Action was brought in this Court for selling Lord *Burleigh's* Estate.

This Action of Sale was brought against Mrs. *Margaret Balfour*, at the Instance of Mr. *Robert Bruce*, Advocate, now Lord *Kennet*.—The first Summons of Sale comprehended only, in general, the Coal and Lands belonging to the Common-debitor; but, as the foresaid Coal of *Cocklaw* was not situated within the Lands of the Common-debitor, so, in order to prevent any Mistake, a new Adjudication was deduced, and a new Sale raised, comprehending expressly

expressly the Coal in the Lands of *Cocklaw*; and this Process being conjoined with the former, the Sale proceeded upon both, and the Estate having been exposed in different Lots, and the Coal of *Cocklaw* in a Lot by itself, it was purchased by the Respondent at the high Price of 8000 *l. Scots*.

This Purchase was made in 1752, and soon thereafter the Respondent had occasion to work the Coal throughout the whole Lands of *Cocklaw*, both in the Wester and Easter Parts thereof, and particularly in that Part which belongs to the Petitioner.— These Works were carried on for some Years without Challenge or Interruption; and, in 1759, when the Respondent was setting down a new Sink in the Petitioner's Lands, though the Petitioner took an Instrument against him, yet he did not, on that Occasion, pretend, either that he had a Right to the Coal in his own Lands, or that the Respondent had no Right to the Coal in these Lands; the Petitioner only protested that the Respondent should be liable for what Damage he should do to the Ground by these Operations.

And it is believed the Respondent would have met with no further Trouble, had it not been for a particular Circumstance.— The Progress of Lord *Burleigh's* Estate, as frequently happens when Estates are sold before your Lordships, had been mislaid, or abstracted, and was for some Time a-missing: It was afterwards accidentally found, in such a Manner as gave the Petitioner an Opportunity of having it examined by his Agent. It seems, upon the Examination, some Defects appeared in Lord *Burleigh's* Progress to the Coal; and, it is believed, that Circumstance, and not any Belief of his own Right, induced the Petitioner to bring this Action against the Respondent, concluding to have it found and declared, that the Respondent had no Right to work Coal in the Petitioner's Lands of *Easter Cocklaw*; that he should desist and cease from working the same; and further, that he should be liable in 500 *l. Sterling* of Damages, besides the Expence of Process.

This Action came before Lord *Auchinleck* Ordinary, when the Respondent pleaded, in Defence, that the Coal had been purchased by him, at the judicial Sale of Lord *Burleigh's* Estate.—The Respondent further showed, by a Narrative of the Progress, and the Possession, that the Coal had undoubtedly belonged to the Family of *Burleigh* before the Sale. And these Pleas having been
stated

July 7th,
1767.

stated pretty fully in a Minute, the Lord Ordinary, of this Date pronounced the following Interlocutor: "Having considered the Debate, appoints both Parties to produce the several Writings set forth by them severally; and the Pursuer likewise to make Answer to the Defender's Allegation as to the Possession."

In Obedience to this Interlocutor, the Petitioner gave in an explicit Acknowledgment of the Possession.—He admitted that the Coal in his Lands, as well as in the Lands of *Wester Cocklaw*, had been possessed by Lord *Burleigh*, or those in his Right, since 1697, uninterruptedly: That before then, the Coal had been possessed in the same Manner by those in the Right of the Charter 1573, for the Time; and the Respondent imagined so clear an Admission superseded the Necessity of producing a Multiplicity of Writings. The Lord Ordinary, however, of this Date, pronounced the following Interlocutor: "Having resumed the Consideration of the former Minutes of Debate, with the Answers given in, by the Pursuer, to the Defender's Allegation as to working the Coal; and having also considered that the Defender has not produced the Writings founded on by him for showing that he has Right to work the Coal in the Pursuer's Lands of *Cocklaw*; finds the Defender has no Right to work the said Coal, and discharges him from further working the same; and decerns."

July 23d,
1767.

Against this Interlocutor the Respondent preferred a Representation, and having at the same Time produced the different Writings that he founded upon, the Petitioner gave in a full Answer, to which the Respondent having replied, the Lord Ordinary, upon advising the whole, of this Date, pronounced the following Interlocutor: "Having again considered this Representation, Answers thereto, and Replies, with the several Writings produced by both Parties, since pronouncing the Interlocutor reclaimed against, finds, That it is not controverted by the Pursuer, that the Coal, to which the Defender has Right, goes some times by the Name of the *Keltie Coal*; at other Times, by the Name of the *Deadfneuck Coal*; and therefore finds, that the Defender, in consequence of his Purchase at the judicial Sale, upon Mrs. *Margaret Balfour's* Bankruptcy, has Right to the Coal, called *Keltie* or *Deadfneuck Coal*: Finds it instructed by the Seafine produced in 1573, in favours of *William Douglas of Lochleven*, that he, the said *William Douglas*, was infeft in the Coal, called *Keltie Coal*, in consequence of a Charter granted to him by *Robert*,
Commendator

“ Commendator of *Dunfermline*: Finds it instructed, That the
 “ Lands of *Cocklaw*, *Easter* and *Wester*, which lie contiguous to
 “ the Spot, called *Keltie*, where there are fundry old Coal-pits,
 “ did anciently belong to the Abbacy of *Dunfermline*, and, so far
 “ as appears, were the Property of that Abbacy in 1573, when
 “ the foresaid Grant was made to the Laird of *Lochleven*: Finds
 “ sufficient Evidence, that the Defender has Right by Progress to
 “ what was granted to the Laird of *Lochleven*: Finds, that as the
 “ Laird of *Lochleven*’s Grant is general of the *Keltie* Coal, and no
 “ Limits, how far the same should extend into the Property of the
 “ Abbacy, the Extent falls to be explained by the Possession which
 “ hath followed upon this Right: And, as it is admitted by the
 “ Pursuer, that not only the Defender, but the Family of *Bur-*
 “ *leigh*, and their Authors, have immemorially been in use to
 “ work the Coal in the Lands of *Easter Cocklaw*, belonging to the
 “ Pursuer, peaceably, and without Interruption, till very lately,
 “ about the Time of the Commencement of the present Process:
 “ Finds, That the Defender, in consequence of his Right aforesaid,
 “ has secured his Title to the Coal in the Pursuer’s Lands; and
 “ finds, that the Charter of *Easter Cocklaw*, granted by *Robert*,
 “ Commendator of *Dunfermline*, before mentioned, in 1579, to
 “ *William Mackie*, with a Reservation of a Liberty of working Coal in
 “ favours of the said Commendator, cannot avail the Pursuer, in
 “ respect not only that Charter is posterior to the Charter to *Loch-*
 “ *leven*, but also, because the Pursuer has no Right from the
 “ Commendator to the Right reserved, but the same falls under
 “ the Right, which the Defender’s Predecessor obtained from the
 “ Commendator; and therefore sustains the Defences, assailzies
 “ the Defender, and decerns; but finds no Expences due, super-
 “ seding Extract till the 20th of *January* next”

After this Interlocutor was pronounced, it appeared the Petiti-
 oner produced only such of his Title-deeds as made for his own
 Purpose.—The Lord Ordinary, in his Judgment, lays some Stress
 upon the Priority of *Lochleven*’s Grant of the Coal 1573, to *Wil-*
liam Mackie’s Feu-charter 1579.—To obviate this Difficulty, the
 Petitioner produced an older Charter still, in 1566; but as this
 Deed made the Question, if possible, clearer than formerly against
 him, because it contained an express Reservation of the Coal, in
 favour of the Commendator and his Successors; so the Lord Or-
 dinary, upon advising a Representation for the Petitioner, founded

Jan. 25th,
1768.

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chiefly upon the last mentioned Charter, of this Date, pronounced the following Interlocutor: " Having considered this Representation, with the Representer's new Production, finds, that though, " by the Charter now produced, it appears that the Abbot of *Dunfermline* had feued out Part of the Lands of *Cocklaw*, which " possibly were the same which now belong to the Respondent, before he made a Grant of the Coal to the Pursuer's Author, yet, " as the Charter now produced by the Respondent, expressly reserves to the Commendator and Convent the Right of working " the Coal, without any Limitation or Restriction, adheres to the " former Interlocutor, with this Variation, that, in place of the " Lands of *Easter* and *Wester Cocklaw* appearing to be the Property " of the Abbacy of *Dunfermline* in the 1573, the Coal in these " Lands shall be put;—and, therefore, refuses the Desire of this " Representation."

A Representation was given in by the Pursuer, complaining of this Interlocutor; but, upon advising the same, without Answers, the Lord Ordinary adhered:—The Petitioner reclaims, and is now to be answered.

The particular Reasons of the Lord Ordinary's Judgment are so distinctly set forth in the Judgment itself, that, when the Question is attended to, a sufficient Answer thence arises to the various Pleas urged by the Petitioner.—Neither does the Petitioner controvert any of the Propositions established by the Interlocutor, but, by giving imperfect Recitals of the Clauses in the Deeds, and then arguing upon these as if they were compleat, and by stating Pleas which were neither maintained by the Respondent, nor founded upon by the Lord Ordinary in his Judgment, the Petitioner endeavours to establish, that the Coal in question is his Property, and cannot belong to the Respondent, in virtue of his Purchase.

The Petitioner, in the Entry, is at great Pains to show, that, unless the Coal in question belonged to the Family of *Burleigh* before the Bankruptcy, the Decree of Sale of this Court cannot support the Right of the Respondent.—But this is a Stroke of Art in the Petitioner, to withdraw your Lordships Attention; for, however it may have been found by this Court, that a Decree of Sale, in all Events, secured the Right of the Purchaser, yet the Respondent, upon this Occasion, is under no Necessity of maintaining that Proposition:—His Right does not depend upon it, nor does

does the Lord Ordinary's Judgment, in any Shape, proceed upon that Principle.

The two Pleas insisted upon by the Petitioner are, in *the first place*, that, supposing the Coal in the Petitioner's Lands to have originally belonged to the Family of *Burleigh*, yet it does not now belong to the Respondent, as his Purchase included only the Coal of *Deadfneuck*, in the Lands of *Wester-Cocklaw*, which are a separate and distinct Tenement from *Easter-Cocklaw*, the Petitioner's Lands. —But, more particularly, he insists, *2do*, That the Coal in his Lands of *Easter-Cocklaw* did never belong to the Family of *Burleigh*.

With respect to the first of these Questions, the Respondent is a good deal astonished to see it insisted upon in the Petition.---The Procedure in the Sale is incompletely recited, otherways the Petitioner's Plea upon that Point, in any Way he could state it, would appear altogether untenible.

It appears from the Decree of Sale, that Lord *Kennet*, the original Pursuer in this Adjudication, and the Summons of Sale consequent thereupon, had omitted to include the Coal of *Cocklaw*, which then belonged to the Family of *Burleigh*; for that Reason, *Edward Caithness*, another Creditor, deduced an Adjudication, and brought a new Summons of Sale, wherein the Coal of *Cocklaw* was expressly included; and that Summons was remitted to, and conjoined with, the former, in consequence of a Petition to the Court, setting forth, " That the said Mrs. *Balfour* is Proprietor
" of a Coal, *lying below the Lands of Wester and Easter Cocklaws*,
" belonging to *David Black* and others, and of a small Piece of
" Land and Colliers Houses thereto belonging; and it being apprehended, that the general Words of *Coals* and *Heughs*, &c.
" contained in the said *Robert Bruce's* Adjudication and Summons
" of Sale, were not sufficient to comprehend the said Coal, which
" does not lie under the said Mrs. *Balfour's* own Lands, therefore,
" &c."---The Petition goes on, and craves that the second Summons may be conjoined with the first, which was accordingly granted, and, upon the two together, the Sale was carried to an Issue.

It is manifest, from this State of the Procedure, that all Right in the Family of *Burleigh* to Coal within the Lands, either of *Easter* or *Wester Cocklaw*, were included in the Sale, and accordingly sold and purchased by the Respondent.---It is true, in the
Decree

Decree of Sale, it is denominated the Coal of *Deadfneuck* only ; but it is clear as Sun-shine, that under that Name was comprehended the whole Colliery contained in the Summons of Sale.--In the Course of the Procedure, it is called sometimes *Deadfneuck*, sometimes *Keltie Coal* ; and, if any Inference could be drawn from the Name of *Deadfneuck* only being used in the Decree of Sale, as if it had been thereby intended to confine the Respondent's Purchase to the Spot passing under that Name, the Argument would prove more than the Petitioner desires;---it would go the Length to deprive the Respondent of the *Keltie Coal*, which the Petitioner admits is the Coal that the Respondent, by his Purchase, is entitled to possess.

Two Things therefore, are undeniably certain:--- In the *first place*, That the Defender's Purchase carried every Right that the Family of *Burleigh* had to Coal in the Lands of *Cocklaw*.---And, *2dly*, That Lord *Burleigh's* Right was understood to comprehend the Coal under the Lands of *Easter*, as well as *Wester Cocklaw*.---It remains only therefore to be shown, in answer to the *second Proposition* maintained by the Petitioner, that the Family of *Burleigh* had a Right to the whole Coal in these Lands.

And, in establishing this Proposition, the Respondent holds it as unnecessary to recapitulate the Progress whereby the Family of *Burleigh* connected with *Lochleven's* Grant to the Coal from the Commendator of *Dunfermline* in 1573.---The Progress is unexceptionable.---The Lord Ordinary finds sufficient Evidence, that the Defender has Right, by Progress, to what was granted to the Laird of *Lochleven*, and the Petitioner acquiesces in this Part of the Judgment, and departs from any Objection that might arise from some seeming Defects in the meise Conveyances of that Right.

And, as that is the Case, it is impossible, with any show of Reason, to maintain, that *Lochleven's* Grant does not comprehend the Coal in the Petitioner's Lands.---The Words of the Grant are: " Præfatam nostram carbonariam, lie Keltie-heugh nuncupat. una
" cum solo ejusdem, cum tofta, crofta, et acra terræ eidem adjacen.
" jacen. infra bondas et limites oppidorum et terrarum de Cocklaw
" et Laffodie, infra dominium de Dunfermline, et vicecomitatum
" de Fife."-----This Grant is general-----it mentions *Keltie Coal* indeed, by which Name the Colliery probably past, but it explains the Colliery passing under that Name to comprehend the
Coal

Coal through the whole Lands of *Cocklaw* and *Lassodie*, without confining it to one Part of these Lands more than to another. And,

2do, It cannot be denied, that the Pursuer's Lands of *Easter-Cocklaw* are properly comprehended under the general Name of *Cocklaw*.---This is manifest from his own Progress and the History of these Lands.---Originally the whole belonged to the Abbots of *Dunfermline*, and passed under one general Name; the Distinction between the *Easter* and *Wester* Parts of *Cocklaw* took place only after they were given in Feu to different Feuers by the Abbot and Convent, or by the Commendator :---and, more particularly, that Part which now belongs to the Pursuer, is described in a Charter produced by himself as follows : " Totas et integras quinque solidatas terrarum, et villæ orientalis dimidietatis de *Cocklaw*."---Again, in his own Disposition, they are described, " all and hail these our three eighth Parts of the Town and Lands of *Cocklaw*, with the Houses, Biggings, &c. also the five Shilling Land of the said Lands and Town of *Cocklaw*, of the East Half thereof."

Again, in a Seafine in 1757, in favour of this Petitioner and his Father, over their third Part of *Lassodie* Mill, *Cocklaw* is enumerated among the Lands astricted to the Mill.---The same Thing occurs in another Seafine in 1734, in favours of *James Mudie*, the Petitioner's Father.---These are their only Titles to the Thirlage; and the Petitioner cannot deny, that, under the general Description of *Cocklaw*, both Portions thereof are astricted, and grind their Corns at the Petitioner's Mill. And,

3tio, As there is no Ambiguity in the Words of *Lochleven's* Grant; so, in Conformity to the Words, the Possession has immemorially been universal throughout the whole Lands of *Cocklaw*, the East as well as the West Part thereof.

And, from the Circumstances and Connexion of the Parties, the Effect of the Possession, in explaining the Extent of the Right, in this Case, must be more powerful than almost in any Case that can occur. It will be remembered, that the Earl of *Morton*, Successor to *Douglas* of *Lochleven*, wadset, in 1642, the Coal to *William Mackie*, then Proprietor of that Part of *Cocklaw* which now belongs to the Petitioner.---This Wadset-right was afterwards divided; and while any Part of it remained with the Proprietors of

Decree of Sale, it is denominated the Coal of *Deadfneuck* only; but it is clear as Sun-shine, that under that Name was comprehended the whole Colliery contained in the Summons of Sale.--In the Course of the Procedure, it is called sometimes *Deadfneuck*, sometimes *Keltie Coal*; and, if any Inference could be drawn from the Name of *Deadfneuck* only being used in the Decree of Sale, as if it had been thereby intended to confine the Respondent's Purchase to the Spot passing under that Name, the Argument would prove more than the Petitioner desires;---it would go the Length to deprive the Respondent of the *Keltie Coal*, which the Petitioner admits is the Coal that the Respondent, by his Purchase, is entitled to possess.

Two Things therefore, are undeniably certain:--- In the *first place*, That the Defender's Purchase carried every Right that the Family of *Burleigh* had to Coal in the Lands of *Cocklaw*.--And, *2dly*, That Lord *Burleigh's* Right was understood to comprehend the Coal under the Lands of *Easter*, as well as *Wester Cocklaw*.--It remains only therefore to be shown, in answer to the *second Proposition* maintained by the Petitioner, that the Family of *Burleigh* had a Right to the whole Coal in these Lands.

And, in establishing this Proposition, the Respondent holds it as unnecessary to recapitulate the Progress whereby the Family of *Burleigh* connected with *Lochleven's* Grant to the Coal from the Commendator of *Dunfermline* in 1573.---The Progress is unexceptionable.---The Lord Ordinary finds sufficient Evidence, that the Defender has Right, by Progress, to what was granted to the Laird of *Lochleven*, and the Petitioner acquiesces in this Part of the Judgment, and departs from any Objection that might arise from some seeming Defects in the meane Conveyances of that Right.

And, as that is the Case, it is impossible, with any shew of Reason, to maintain, that *Lochleven's* Grant does not comprehend the Coal in the Petitioner's Lands.---The Words of the Grant are:
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Again, in a Seafine in 1757, in favour of this Petitioner and his Father, over their third Part of *Lassodie* Mill, *Cocklaw* is enumerated among the Lands astricted to the Mill.---The same Thing occurs in another Seafine in 1734, in favours of *James Mudie*, the Petitioner's Father.---These are their only Titles to the Thirlage; and the Petitioner cannot deny, that, under the general Description of *Cocklaw*, both Portions thereof are astricted, and grind their Corns at the Petitioner's Mill. And,

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And, from the Circumstances and Connexion of the Parties, the Effect of the Possession, in explaining the Extent of the Right, in this Case, must be more powerful than almost in any Case that can occur. It will be remembered, that the Earl of *Morton*, Successor to *Douglas* of *Lochleven*, wadset, in 1642, the Coal to *William Mackie*, then Proprietor of that Part of *Cocklaw* which now belongs to the Petitioner.---This Wadset-right was afterwards divided; and while any Part of it remained with the Proprietors of

Easter Cocklaw, they possessed the Colliery; but when the whole of the Wadset centered in Lord *Burleigh*, in 1697, from that Time downward no person pretended to possess the Coal in any Part of the Lands of *Cocklaw*, except in virtue of a Right or Tolerance from the Family of *Burleigh*.

And the Circumstances of this Possession are remarkably striking with respect to *John Stevenson*, Father of *John Stevenson*, from whom the Petitioner purchased his Lands.—*Stevenson* was the Grandson, and Heir of *John Mackie*, Son of *William Mackie*, the original Wadsetter of the Coal. By that means, besides the Lands of *Easter Cocklaw*, *Stevenson* succeeded to that Half of the foresaid Wadset which had remained with *William Mackie*, his Great-Grandfather, and which, by the Terms of the original Wadset, contained an Obligation upon the Reverfor, to grant a Tack for five Years after the Redemption. Accordingly, before the Redemption, which took place in 1697, *Stevenson* was in Possession of the Coal in his own Lands of *Easter Cocklaw*. After the Redemption he possessed the Coal for five Years, in virtue of a Tack, which is now produced, together with a Discharge of the Tack-duties; but from the Expiry of the Tack, *Stevenson* never attempted to work the Coal in his own Lands; he immediately desisted, and allowed it to be peaceably possessed by the Lessees of the Lords of *Burleigh*.

And in like manner the Possession ever since has been uninterrupted;—first, under the Eye of *Stevenson*, who renounced the Wadset; and then of his Son, this Petitioner's Author.—The Lessees under Lord *Burleigh*, uniformly possessed all their Time, while the Estate remained with the Family of *Burleigh*, and also after the Sequestration. The Possession has also been the same since the Commencement of the Petitioner's Right in 1747, both before the Sale in 1752, and since the Sale, by the Respondent, without any Interruption whatever, till the Protest taken in 1759, which seems to have been intended to put the Respondent on his guard to do as little Damage as possible, by putting down his Sinks, rather than to interrupt his Possession of the Coal.

And this Possession was not *clam*, or by an under-ground Invasion, which sometimes happens in Coal, without any Right upon the Part of the Invader; it was open, and by visible Acts, by a Variety of different Sinks put down by Lord *Burleigh*'s Tacksmen,
in

in different Places of the Petitioner's Grounds; and these Sinks, from which large Quantities of Coal have been extracted, are known at this Day by different Names. And this Possession has all along been admitted by the Petitioner.

And therefore the Respondent apprehends his Plea comes to a very short Point.—The Charter 1573, with which the Respondent connects, gives Right to all the Coal in the Lands of *Cocklaw*, whereof the Petitioner's Lands are a Part; and, in consequence of that Right, the Respondent and his Authors have, for Time immemorial, exercised every Act necessary to a Colliery throughout all the Petitioner's Grounds.—The Respondent humbly submits, whether it is possible to figure a better Title than what arises from so clear a Grant, followed by such long and uninterrupted Possession in Conformity to it.

And here the Respondent must observe, that the Petitioner seems wilfully to mistake the Nature of his Right to the Coal.—The Petitioner argues, as if the Respondent were pleading a prescriptive Right, and is at great pains to show, that there is no Title upon which Prescription could run, nor no *termini habiles* for that Plea in this Case. But the Respondent does, by no Means, found upon a prescriptive Right, and he disclaims the Necessity of that Plea.—His Plea is upon the Grant 1573, which, both from the express Words, and the subsequent Possession, must be understood to comprehend the Coal in the Petitioner's Lands; and, upon that Principle, not upon any Plea of Prescription, the Lord Ordinary's Judgment is founded.—He finds, “ That as the Laird of *Locheven*'s Grant is general to the *Keltie* Coal, and no Limits, how far the same should extend into the Property of the Abbacy, the Extent falls to be explained by the Possession which hath followed upon this Right.”

After what has been said in support of the Interlocutor, few Words will be necessary, in answer to the various Topicks urged in the Petition.

And, *First*, whereas it is said, “ That the Charter 1573 gives a Right only to the Coal of *Keltie*, with the Ground of the same; that the Coal goes along with the Ground;—but that the Coal is first mentioned in the Deed, because the Ground of *Keltie* is a trifling Pendicle, of little Value;—and that the Charter gives no Right to the Coal in the Grounds of another.”—The Respondent

Petition, p.
10.

Respondent confesses, he is not altogether sure, if he comprehends the Petitioner's Meaning in this Observation.—If he supposes, that the Grant in the Charter 1573, is confined to the Land of *Keltie*, it would give the Respondent no Coal at all, because there are no Lands that pass under that Name, and the Colliery is so called, from the Village of *Keltie* in its Neighbourhood.—And, 2^{do}, It is still more extraordinary in the Petitioner, to say, that the Charter 1573 gives no Right to Coal in any other Lands but *Keltie*, when it expressly gives the Coal *infra bondas et limites oppidorum et terrarum de Cocklaw et Lassodie*.—But the Petitioner, in reciting the Clause of the Charter, has found it necessary to leave out these Words, in order to give his Conclusion the Appearance of Probability.

2^{do}, It is said, that the Commendator of *Dunfermline* had no Power to convey a Right to *Douglas of Lochleven* of the Coal in the Lands of *Easter Cocklaw*, by the Charter 1573, because he was *ab ante* denuded of these Lands by the Feu-charter to *William Mackie* in 1566. And it was further said, “That it can never be presumed, that the same Person, who granted the Charter 1566, in favour of the Petitioner's Author, without reserving the Coal in these Lands. would, in the Space of seven Years thereafter, be conveying away that Coal to another.”

In Answer to this, it may, in the *first place*, be observed, That the Petitioner, so far as has hitherto appeared, produces no Progress connecting him with either of the Charters 1566, or 1579; nor does it appear that the Lands granted in the first of these Charters are that Part of *Cocklaw* which is now the Property of the Petitioner. But, however that may be, it is astonishing in the Petitioner to maintain, that the Lands in either of the foresaid Charters are granted without a Reservation of the Coal, when the Charter 1566 contains the following Clause: “Necnon volumus, quod licebit nobis, aut successoribus nostris, effodere, extrahere, et habere, carbonaria et carbones, in dictis terris, toties quoties opus fuerit, absque dictorum respective feudifirmariorum enormi læsione.”

And whereas it is said, “That this Reservation imports only a Privilege of taking Coal for the Use of the Commendator himself; and that this Construction is further supported by the reserving Clause in the Charter 1579;” it is answered, that no Clause

Clause in the Charter 1579 could in any shape affect the Right which *Lochleven* obtained to the Coal in 1573. At the same Time it will appear that the reserving Clause in that Charter is by no means clear.—And with respect to the Reservation above recited in the Charter 1566, it clearly imports the full Right and Use of the Coal within the Lands contained in the Right; and that it was the Purpose of the Granter to reserve the Coal out of both these Charters, is manifest from the Omission of the Words, *carbonibus*, *carbonariis*, in the Tenenda's, when at the same Time a minute Enumeration of all the other Particulars is expressed; and that in all Probability there was then a Going-coal in the Lands. And,

3dly, All Dubiety as to the Extent of the Reservation is now cleared up by the Possession, as the Petitioner must admit that the Coal in his Lands has been possessed in the same Manner as the Coal in the other Parts of *Cocklaw*, without any Restriction or Limitation whatsoever.

4thly, It is said, that the Charter 1573 was not understood by the Family of *Burleigh* to comprehend even the Coal in *Wester Cocklaw*; because, by a Contract, of this Date, between Lord *Burleigh*, *David Mackie*, and *John Black* of *Wester Cocklaw*, *John Black* made over the Coal in his Lands of *Wester Cocklaw*, on certain Conditions; therefore, says the Petitioner, if the Charter 1573 did not comprehend the whole Coal in the Lands of *Wester Cocklaw*, it cannot be presumed to have comprehended the Coal in *Easter Cocklaw*. Nov. 20th,
1673.

This Observation is at any rate of little Consequence, when opposed to the immemorial Possession. But besides, upon considering the Contract itself, the Matter is easily explained. In the first place, *John Black's* Interest, which he conveys on that Occasion, appears to have been rather a Pretension than a Right. The Narrative bears, that Lord *Burleigh* and *David Mackie* were each of them Proprietor of a Half of the Coal; and if that was so, *John Black* could have no Interest at all. And further, it is probable, that *John Black's* Pretensions were grounded upon his Claim to a certain Share of the Wadset 1642. How that Share came into his Person, the Respondent cannot say, as he is not possessed of *Black's* Writings. Be that, however, as it will, it is but a slender Presumption against the Extent of the Grant 1572, that the Petitioner draws from the foresaid Contract, and can be of no Avail

in Opposition to the contrary Presumptions arising from all the Title-deeds, and the immemorial Possession.

But though this Contract has but little Weight in favour of the Petitioner, it appears to contain something extremely conclusive against him.—*John Black* was Proprietor of *Wester Cocklaw*, and the Contract, after stipulating a certain Quantity of Coals to be delivered to *John Black*, while the Works continued in his Ground, has the following Clause: “ And if it shall happen that the said
“ Coal shall be taken out of the said *John Black* his Ground, and
“ the Sinks, Heughs, and Eyes, not going in his Ground, in that
“ Case the said *John Black* not only passes from any Right to the
“ said Coal, and, in particular, unto his said Fourth-part, where-
“ to he *pretends* Right heritably, as said is, but also he, by thir
“ Presents, restricts himself, and his forefairs, to three Loads of
“ Coals in every Fortnight’s Time allenary.”—This Clause proves, beyond Contradiction, that Lord *Burleigh*’s Coal, which is now the Respondent’s, might be wrought in other Lands than those of *Wester Cocklaw*, belonging to *John Black*, which, of consequence, must have been the Lands of *Easter Cocklaw*, now belonging to the Petitioner.

The Petitioner says, his Authors never wrought the Coal in their own Lands, because it was of little Importance, and they had no Inclination to fall out with the powerful Family of *Burleigh*.—But this is quite out of fight.—The Family of *Burleigh*, in later Times, have not been very powerful; and it was surely as easy for the Petitioner’s Authors to work the Coal in their own Lands, as for any other body to work it.—Now the Possession is admitted over all *Easter Cocklaw*, and, particularly, the Coal, was possessed by the Proprietor of *Easter Cocklaw*, while he continued in the Right of any Part of the Wadset 1642; but after the Redemption of that Wadset, they never pretended to possess, not because the Possession was impossible, but because they had no Shadow of a Right.

The Respondent cannot conclude without observing, that, if Mr. *Mudie* had prevailed in this Plea, he would have been as lucky as the Respondent would have been singularly unfortunate.—The Respondent paid a high Price for the Coal, in the view of possessing it as it had formerly been possessed, whereas the Petitioner paid nothing for the Coal in his own Lands; for, as there is no Mention

of

of it in his Disposition, your Lordships cannot believe that the Coal was considered as any Part of the Purchase.—There was then a Going-coal in the Lands ; and had it been the Belief, either of the Purchaser that he was acquiring, or of the Seller, that he was conveying a Right to the Coal, it would have been expressly mentioned in the Disposition.—Hence your Lordships see the Tendency of the Petitioner's Action is to evict a Subject for which he never paid any Value, from another Person who purchased it at a high Price.

And as, besides the Injustice of this Attempt, the Petitioner's Pretensions are void of all Foundation in Point of Right, the Respondent, in humble Confidence, expects your Lordships, upon refusing the Petition, will also allow him the Expence of Process, in so far as that Demand is not foreclosed by the Lord Ordinary's Judgment.

In respect whereof, &c.

COSMO GORDON.

of it in his Disposition, your Lordships cannot believe that
Coal was considered as any Part of the Property. — There was
then a Closing-coal in the Land; and had it been the Property
of the Testator, that he was acquiring, or if the other Part is
not considered as a Right to the Coal, it would have been expressly
mentioned in the Disposition. — Hence your Lordships for the Jan-
duary of the Testator's Action is to give a subject for which
he never said any Value from another Person who purchased it as
a Right.

And as to the Justice of this Award, the Testator's
Petitions are void of all Foundation in Point of Right, the In-
terest in the Property, especially your Lordships upon
taking the Testator, will shew him the Expense of Proof, as
to say that the same is not included by the Land Ordinance
Judgment.

IN WITNESS WHEREOF, &c.

COSMO GORDON

